the cable operator's right to retier has been bolstered by the 1992 Cable Act.[305]

The Conference Report recognized "that many cable operators have shifted cable programming out of the basic tier into other packages and that this practice can cause subscribers' rates for cable service to increase."[306] The Commission also recognizes this distinction in the Notice:

> [W]e propose to prohibit an unjustified increase in rates to subscribers for cable service resulting from retiering that 'shift[s] cable programs out of the basic tier into other packages.' At the same time, the Cable Act of 1992 permits, and indeed appears to require in some cases, a restructuring of service offerings.[307]

Accordingly, a reading of the statute, its legislative history, and the Notice confirms that "evasion" is not intended to proscribe conduct which would be consistent with the 1992 Cable Act's rate regulation provisions. Therefore, the Commission has correctly determined that "[r]etiering necessary to comply with basic tier requirements, retiering that did not change the ultimate price for the same mix of channels in issue to the subscriber, or retiering accompanied by a price change

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[305] See also Conf. Report at 65 (specifically allowing "changes in the mix of programming services that are included in various tiers of cable service").

[306] Id. (emphasis added).

[307] Notice at ¶ 127 (emphasis added) (footnotes omitted).

that complied with our rate regulations would not be deemed an evasion."[308]

Put another way, retiering that is price neutral (the same services for the same ultimate price, just packaged differently) is clearly not an evasion. On the other hand, a cable operator may not "evade" the rate review requirements of the 1992 Cable Act by claiming that a rate increase has not resulted from retiering that in fact changes the ultimate price of the services. Thus, any retiering, splitting of tiers, or other actions that result in less service (i.e., fewer channels) to the subscriber is an implicit rate increase even if the actual price remains the same. Such price increases would then be exposed to the appropriate scrutiny (e.g., under the basic benchmark or bad actor test) to determine reasonableness.

For example, if a cable operator removes two channels from a tier and retains the same price, the operator cannot evade rate review by claiming that there has been no "rate increase" merely because the price had remained the same. To the contrary, an implicit rate increase has been imposed as to that tier because the subscriber is receiving fewer channels for the same price. Such a rate increase would be subject to scrutiny pursuant to the applicable rate review procedures ultimately adopted by the Commission. However, if the cable operator removes two channels from a tier and replaces them with two different channels, while

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[308] Id.

not changing the ultimate price, the Commission is in no position to rule that an evasion has occurred because the new channels are somehow less "valuable" than the channels that were removed. As Congress has determined, "changes in the mix of programming services that are included in various tiers of cable service" should be left to the cable operator's discretion.[309] Any other interpretation would necessarily involve the Commission in making value judgments regarding the content of channels, an area that the Commission is neither permitted nor equipped to enter.[310]

Additionally, we note that "mix or quality" of service are not subject to local review in the franchise renewal process.[311] This type of content review is thus off limits to local government as well as the Commission, and there is no evidence that Congress intended the cable operator's discretion over the mix or quality of service to be negated in the context of "evasions." The cable operator's right to retier and to determine the mix or quality of service with no governmental intrusion cannot be swept away by the broad brush of "evasion."

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[309] See Conf. Report at 65.

[310] Such expansive Commission intrusion into cable operators' First Amendment editorial rights would surely be found unconstitutional by the courts. See, e.g., City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1985); Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied., National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987), cert. denied, National Association of Broadcasters v. Century Communications Corp., 486 U.S. 1032 (1988).

[311] See 47 U.S.C. § 546(c)(1)(B).

On the other hand, it would be easily quantifiable, identifiable, and apparent to the Commission if a cable operator decreased the level of cable service on a tier while keeping the price the same. Likewise, it would be readily identifiable if the cable operator decreased the level of service on a tier and decreased the price, but by a smaller amount in proportion to the decrease in service. For example, if two channels were dropped from a ten channel tier, but accompanied by only a ten percent price decrease, this would also be an implicit price increase. Both situations result in a higher price per channel, which can easily be ascertained. Such a definition of "evasion" would thus be consistent with the 1992 Cable Act's policy goal directing the Commission to "seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[312]

In sum, Congress has intended that the concept of evasions is in no way meant to foreclose a cable operator's right to tier or rearrange services. Rather, as the Commission apparently recognizes, the prohibition against evasions is meant to target the appropriate rate for the reconfigured service tier that now contains a smaller level of services. The remedy for an "evasion" is to subject the reconfigured service level to the appropriate rate test as ultimately adopted by the Commission. However, any judgments by the Commission regarding a cable

[312]Id. at § 543(b)(2)(A).

operator's programming mix in this situation, where the level of service remains the same, improperly involves the Commission (or local authorities) in content judgment, in violation of the concepts contained in both of the 1984 Cable Act and the 1992 Cable Act, as well as the First Amendment.

VIII. GRANDFATHERING OF RATE AGREEMENTS

The Commission seeks comment on the adoption of rules regarding the treatment of agreements between a franchising authority and a cable operator that provide for the regulation of basic cable service rates where there was no effective competition under governing Commission rules.[313] Although the 1992 Cable Act provides that such agreements are to be grandfathered if they were entered into prior to July 1, 1990, there is no rational basis for differential treatment of agreements concluded after that date.[314] The 1992 Cable Act does not specifically address how franchising authorities operating under identical agreements entered into after July 1, 1990 are to make the transition to rate regulation under the Commission's new rules. The Commission, therefore, seeks comment on the treatment of these agreements as well.[315] Nashoba asserts that _any_ rate regulation agreement of this type still in effect upon

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[313] _See_ Notice at ¶¶ 134-35.

[314] _See_ 47 U.S.C. §543 (j).

[315] _See_ Notice at ¶ 135.

implementation of these rules, whether concluded before or after July 1, 1990, should be treated in the same manner -- all should be grandfathered. There is simply no reason to treat valid pre-July 1, 1990 and valid post-July 1, 1990 rate regulation agreements differently.[316]

Any rules implementing Section 623(j) should apply only to basic cable service as defined by new Section 623(b)(7). Under this definition, cable operators are free to retier their cable programming. Any rates for non-basic tiers of "cable programming service" are then subject to exclusive Commission review pursuant to Section 623(c).

Finally, any grandfathered basic rate agreements between a franchising authority and a cable operator must be enforceable by either party, regardless of whether the rate provided under such an agreement is greater or less than rates that might result under the Commission's new rate formula. The purpose of grandfathering existing basic rate agreements is to exempt such agreements from the rate regulation rules implemented pursuant to Section 623,[317] because those basic cable rates have already been regulated, via agreement, where the cable system that is a party to the agreement was not subject to effective competition under

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[316]The legislative history is silent as to the treatment of post-July 1, 1990 rate regulation agreements. See House Report at 89 (section-by-section analysis of 1992 Cable Act addresses only pre-July 1, 1990 rate regulation agreements).

[317]See House Report at 89.

the Commission's regulations in effect when the agreement was concluded.

IX. COLLECTION OF INFORMATION AND REPORTS ON AVERAGE PRICES

The Commission seeks comment on the scope, availability and burden of providing the Commission with financial information necessary for the effective administration and enforcement of rate regulation.[318] Nashoba contends that cost data should not be included in the information collected because it will not be necessary for the administration and enforcement of the preferred type of rate regulation, which is not based on cost of service. Thus, the detailed cost-based annual reports, cost of service standards, and cost accounting requirements proposed in Appendices A-C of the Notice are wholly at odds with Congressional directives that the FCC "avoid erating a cable equivalent of a common carrier "cost allocation manual.'"[319] Nashoba advocates a rate comparison benchmark for the regulation of basic cable service rates, thereby alleviating the need for collection of burdensome cost of service information. Moreover, the fact that Congress is requiring periodic reports from the Commission on average cable prices affirms Nashoba's position

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[318]See Notice at ¶¶ 122-24.

[319]House Report at 83.

that the collection of cost data is unnecessary, and was not intended by Congress when it enacted Section 623(g).[320]

Rules implemented by the Commission in accordance with Section 623(g) should by no means require the collection of information beyond that requested on the forms sent to selected systems on December 23, 1992.[321] The information sought on those forms wisely pertains to revenue only, thereby avoiding competitively sensitive cost data which would trigger confidentiality concerns for the cable operator and the Commission. Furthermore, the plain language of Section 623(g) and the legislative history of that provision state that the Commission's rules should require only the collection of information that is absolutely necessary to administer and enforce rate regulation, and not extra, burdensome data, such as cost of service information.[322]

The Commission's rules on collection of information should impose as light a burden as possible on cable operators who are responsible for gathering the information required by the Commission. Accordingly, Nashoba asserts that all data required

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[320]See 47 U.S.C. § 543(k).

[321]See Order, MM Docket No. 92-266 (released December 23, 1992).

[322]See 47 U.S.C. § 543(g) (cable operators must file with the Commission "such financial information as may be needed for purposes of administering and enforcing this [rate regulation] section"); House Report at 88 (cable operators must file "information necessary to administer and enforce" the rate regulation section).

of cable operators should be collected and submitted to the Commission on a per-system, rather than a per-franchise, basis.[323] Cable operators do not ordinarily keep detailed information on a franchise-by-franchise basis. If the Commission required information on this basis, it would impose a heavy burden on the cable operator to develop such data solely for the purpose of complying with the Commission's information requests. To impose such a burden when it is unnecessary would be inconsistent with Congress' goal that "the Commission [ ] shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission."[324] Nashoba further asserts that all Commission requests for cable system data rate should be contained in a single form so that the cable operator will know the full extent of information required for each system.[325]

The Commission's rules regarding collection of information should also be sufficiently tailored so that they do not apply to public companies that are already required to file such information for public disclosure. Finally, the Commission should not finalize its collection of information forms in this proceeding. Rather, the Commission should issue a further notice after the conclusion of its rate proceedings so that the forms

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[323] See Notice at ¶ 138.

[324] 47 U.S.C. § 543(b)(2)(A).

[325] See Notice at ¶ 138.

can be specifically tailored to the rate regulations actually implemented in this proceeding.[326]

X. EFFECTIVE DATE

Section 623 of the Act requires the Commission to promulgate rules for the regulation of basic service rates, cable service rates and evasions within 180 days of enactment, i.e., by April 3, 1993. While the rules must be in place by then, as the Commission correctly recognizes, the statute does not require that such regulations must take full effect on that date.[327] There are many reasons why cable operators (and franchising authorities) will need time to implement the rules.

To begin, rules for the regulation of basic and non-basic service rates will not exist in a vacuum. The implementation of these rules depends on actions taken in accordance with other provisions of the Act. For example, the composition of the basic tier will not be known until the must-carry/retransmission consent election has been made, and any negotiations required thereby have been completed. Therefore, rate regulation rules cannot go into effect until some time after the must-carry/retransmission consent election deadline, which has not yet been set.

Moreover, the fate of existing non-superstation carriage, and the costs of such carriage if it can be continued, will not

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[326]See id. at ¶ 123.

[327]See id. at ¶ 143.

be known until October 1993. Additionally, there will be equipment changes, subscriber billing implementation, retiering to satisfy basic service requirements, preparation of subscriber education and marketing materials, notice requirements for proposed increases in basic service rates,[328] etc. All of these changes will take time, some even several months, and action on many of them cannot be taken until after the must-carry/retransmission consent election. Finally, there may be loss of subscriber revenue as a result of downgrading to the new basic service tier.

All of these factors militate in favor of full implementation of the rate regulation rules, particularly the local basic service regulation aspect, being set on a date that allows a reasonable transition period in which to make necessary changes, and that coordinates with these other factors. When Congress passed the Communications Policy Act of 1984, thereby deregulating basic cable rates that were subject to effective competition, it stressed the importance of giving the Commission flexibility in promulgating its rate regulation rules because of the many changes that had to be made.[329] Accordingly, Congress provided for a two-year transition period in which the Commission could fully implement its rate regulation rules.[330]

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[328] See 47 U.S.C. § 543(b)(6).

[329] See 1984 House Report at 66.

[330] 47 U.S.C. § 543 (1984).

While Nashoba does not suggest a two-year transition period for implementation of the new rate regulation rules, we assert that the rationale for allowing a transition period following enactment of the 1984 Cable Act still exists with respect to re-regulating basic cable rates under the 1992 Cable Act. Therefore, this reasoning should be taken into consideration in setting an effective date for the Commission's new rate regulation rules. Nashoba suggests January 1, 1994 as the earliest possible date which provides adequate time for the necessary adjustments to the new regime.

CONCLUSION

As these comments demonstrate, the 1992 Cable Act generally provides only a framework for the imposition of a new rate regulation regime upon the cable television industry. The Commission is left to fill in the massive details of that framework. Thus, Congress has given the Commission tremendous latitude to design specific regulations to implement the statute. The Commission can use its authority to institute a fair, reasoned regime, or it can effectively halt the cable industry's expansion of programming, plant, and technology, which has contributed significantly to customer satisfaction, employment, and the economy as a whole.

As the legislative history of the 1992 Cable Act has recognized:

> The Committee finds that since deregulation took effect in December 1986, the cable industry, as the Committee hoped, has invested substantially in capital

> improvements and programming.... Basic cable networks spent $1.5 billion for programming in 1991, an increase from $745 million in 1988, and more than four times the $340 million spent in 1984. Similarly, the typical cable system offers 30 to 53 channels today compared to the typical 24 channels or less before the [1984] Cable Act was enacted.[331]

A heavy-handed approach to implementation of the rate provisions of the 1992 Cable Act would surely jeopardize these pro-consumer effects. Nashoba therefore strongly urges the Commission to take a cautious, reasoned approach in implementing the 1992 Cable Act's rate regulations. Otherwise, its regulations could cause massive disruptions to the cable industry and to consumers, contrary to the intent of Congress.

Respectfully submitted,

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[331]House Report at 31.